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No.
October Term, 1988

**In the
Supreme Court of the United States**

WEST PENN POWER COMPANY, a corporation,
Defendant-Petitioner,

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C.
ENGLE, t/d/b/a ENGLE's HOLIDAY HARBOR,
A Partnership and as Representative of a Class,
Plaintiffs-Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPERIOR COURT**

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QUESTION PRESENTED

Where the Federal Power Act provides for exclusive jurisdiction in the Federal District Courts over actions at law seeking damages caused by the maintenance or operation of a hydroelectric project maintained and operated under a license issued by the Federal Energy Regulatory Commission, may state courts disregard the exclusivity provision of the Act and entertain subject matter jurisdiction over such actions?

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**PETITION FOR A WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPERIOR COURT**

The Petitioner¹ prays that a Writ of Certiorari issue to review the Order and Opinion of the Superior Court of Pennsylvania entered August 25, 1987.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania, which has not been reported officially, appears in the Appendix hereto (App. A). The Order and Opinion of the Superior Court, reported at 366 Pa. Super. 104, 530 A.2d 913 (1987), appears in the Appendix hereto (App. B). The Order as amended and Opinion of the Court of Common Pleas of Washington County, which has not been reported officially, appears in the Appendix hereto (App. C).

¹Petitioner West Penn Power Company, a corporation, has the following parent, subsidiary and affiliate companies:

1. Parent: Allegheny Power System, Inc.
2. Affiliates:
 - a. Allegheny Power Service Corporation
 - b. Monongahela Power Company
 - c. The Potomac Edison Company
3. Subsidiaries:
 - a. West Virginia Power and Transmission Company
 - b. West Penn West Virginia Water Power Company
4. Subsidiaries which are partially owned by West Penn Power Company:
 - a. Allegheny Generating Company
 - b. Allegheny Pittsburgh Coal Company

JURISDICTION

The Order and Opinion of the Pennsylvania Superior Court was entered on August 25, 1987. The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on April 11, 1988.

The jurisdiction of this Court to review the Order and Opinion of the Pennsylvania Superior Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Section 10(c) of Chapter 12 of the Federal Power Act, contained at 16 U.S.C. § 803(c) (and referred to hereinafter only by citation to the U.S. Code), provides, in pertinent part, as follows:

Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . . constructed under the license . . .

Section 317 of Chapter 12 of the Federal Power Act, contained at 16 U.S.C. § 825p (and referred to hereinafter only by citation to the U.S. Code), which was added to the Act in 1935, provides that:

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

STATEMENT OF THE CASE

Petitioner, West Penn Power Company, operates the Lake Lynn hydroelectric project which is licensed by the Federal Energy Regulatory Commission ("FERC"). The Dam is located on the Cheat River in West Virginia.

Approval for the construction of the Lake Lynn project originally was issued by the State of West Virginia but, because the Cheat River was navigable, the design also required approval by the Secretary of War. The July 3, 1912 approval constituted a fifty-year permit which expired on July 2, 1962. The permit was originally issued to Mountain Park Land Company. West Penn Power Company subsequently acquired the Lake Lynn Dam from a third party after a series of transactions. On October 21, 1970, the Federal Power Commission² issued an Order Issuing License (Major), granting West Penn Power Company a license effective from July 3, 1962 through December 31, 1993.³

Respondents (hereinafter "plaintiffs") purport to represent a class of plaintiffs damaged by flood waters allegedly caused by the existence and operation of West Penn Power Company's federally licensed hydroelectric

²Congress initially enacted "The Federal Water Power Act" on June 10, 1920. That Act created the Federal Power Commission ("FPC") which was given the responsibility, *inter alia*, of licensing non-Federal hydroelectric power projects which affect navigable water or affect the interests of interstate commerce. That Act also requires the FPC to license projects that are adapted to a comprehensive plan for improving or developing a waterway or waterways. That Act was incorporated into the Federal Power Act in 1935. The Federal Power Act extended the FPC's authority to regulate the interstate aspects of the electric power industry. 16 U.S.C. §§ 791a—828c.

³The documents which appear in the Appendix (App. G) are attached as Appendix H to West Penn Power Company's Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

dam. Plaintiffs filed their class action complaint in the Court of Common Pleas of Washington County, Pennsylvania.⁴ Count I (App. E) alleges in substance that West Penn Power Company operated its dam negligently. Count II (App. F) alleges that the very existence of Lake Lynn Dam creates an abnormally dangerous instrumentality.⁵

The flood waters about which plaintiffs complain originated in the Cheat River basin upstream from the Lake Lynn Dam during or immediately preceding Election Day in November, 1985. The flood is commonly known as the Election Day Flood. During the flood, substantial rain fell in the Cheat River basin, the runoff from which caused unprecedented flooding and the flood of record along the Cheat River upstream from the Dam. That flood was of a magnitude such that it would occur no more often than once every five hundred years.

Violations of FERC orders, rules, etc. are presented in substance in plaintiffs' Complaint, as amended, thereby challenging the federal regulatory scheme administered by FERC. Article 33 of West Penn Power Company's license states, in pertinent part, as follows:

The licensee shall not release from Lake Lynn reservoir, during flood periods, flows that will exceed those

⁴Other non-class action cases have been filed against West Penn Power Company in the Pennsylvania state courts in Westmoreland (two cases) and Fayette (one case) Counties as well as Washington County (four additional cases) each challenging the manner of operation of the Lake Lynn Dam and all but one asserting that the presence of the Dam upstream from plaintiffs creates an abnormally dangerous instrumentality thereby challenging FERC's authority to approve and license hydroelectric dams.

⁵Plaintiffs amended Count II of their Complaint on September 11, 1986, after West Penn Power Company had challenged, *inter alia*, Count II of the original Complaint and the trial court sustained that challenge.

which would have occurred in the absence of the project. Project operating procedures to assure compliance with this requirement shall be developed cooperatively by the Licensee and the District Engineer, U.S. Army Engineer District, Pittsburgh.

App. G.

Allegations in the Complaint, as amended, which challenge the operation of the Dam and thus the license are contained in paragraphs 17 and 20 through 27 of Count I (App. E) and paragraphs 33 through 41 of Count II (App. F). Count I alleges negligence in the operation and maintenance of the Dam. Count II seeks damages under an abnormally dangerous instrumentality theory and challenges the propriety of the existence of hydroelectric dams as follows:

39. The operation of a hydro-electric power dam at a location above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in its operation.

40. The release of waters from the dam's lake located above-stream of residential and commercial structures and activity is inappropriate because of the inherent risk involved in such releases.

41. The benefits of the hydro-electric power dam at its location above-stream of residential and commercial property and activity is outweighed by its inherently dangerous attributes.

App. F.

In the plaintiffs' Motion for Class Action Certification which was filed by the plaintiffs on February 22, 1988, the two common questions of fact alleged were:

(a) Whether Defendant West Penn operated the reservoir of the dam in such a way that the dam obstructed and/or released improperly flood waters as if the dam were not present, thus exacerbating the flood wave and the effects of the flooding downstream of the dam; and

(b) Whether Defendant West Penn failed to notify the residents of Washington County through its failure to include Washington County Emergency Management personnel in the Emergency Action Plan developed by West Penn.

The foregoing averments place the issues of violation of Article 33 of the License and the Emergency Action Plan⁶ as the predominant questions of fact for resolution in any class action that would be certified, thereby seeking to contradict FERC's authority and the federal regulatory scheme. Coupled with the allegations of the Complaint, as amended, the above-quoted averments of the Motion for Class Action Certification place at issue the existence of hydro-electric dams. The Motion for Class Action Certification clarifies the issues in the Complaint, as amended, and demonstrates the challenge to FERC's regulation of the operation of the Dam and the necessity for this Petition for Writ of Certiorari.

Plaintiffs' action was removed by West Penn Power Company to the United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. §§ 1441-1452. West Penn Power Company's Removal Petition asserted, *inter alia*, that the state court had no jurisdiction because plaintiffs' claims are subject to the exclu-

⁶Emergency Action Plans for all FERC-licensed hydroelectric projects are required to be submitted to FERC for approval and are required to comply with FERC Regulations. 18 C.F.R. §§ 12.20-12.25.

sive jurisdiction of the federal district courts under the Federal Power Act (hereinafter sometimes the "Act"), codified at 16 U.S.C. §§ 791a-828c. The federal district court declined to decide the issue of exclusive federal jurisdiction and remanded the case to the state court on other grounds. (App. D, page D-8)

In Preliminary Objections subsequently filed in the Court of Common Pleas of Washington County, West Penn Power Company raised, *inter alia*, the issue of exclusive subject matter jurisdiction under the Federal Power Act. That court dismissed the Preliminary Objection on the issue of jurisdiction by its Opinion and Order of August 4, 1986. (App. C). On December 16, 1986, the Pennsylvania Superior Court granted West Penn Power Company permission to appeal. Thereafter, West Penn Power Company appealed from the Order, as amended on August 18, 1986, to the Pennsylvania Superior Court.

On appeal, the Superior Court modified the Order of the Court of Common Pleas, but held that the state courts of Pennsylvania do have jurisdiction to hear and decide the claims that plaintiffs have made in their Complaint. (App. B).

The Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on September 23, 1987. On April 11, 1988, that Court denied the Petition. (App. A).

REASONS FOR GRANTING THE WRIT

This case presents the Court with a matter of first impression concerning a State's authority to regulate the activities of a federally owned or licensed hydroelectric dam. This is not a local issue. It, and the effect on the more

than 1600 federally owned or licensed hydro-electric dams,⁷ raises a question of national significance, to wit, whether the Congressional scheme for federal regulation of hydroelectric dams may be abridged or defeated by disregard of clear statutory language by state courts.

The fundamental question is the effect which must be given to two explicit provisions of a federal act relating to hydroelectric projects located on or affecting the navigable waters of the United States. Furthermore, because of Count II of plaintiffs' Complaint, as amended (App. F), a question is raised which challenges FERC's authority to approve and license hydroelectric dams. In other words, can a hydroelectric dam, properly authorized by and constructed, operated and maintained in accordance with the mandates of FERC, be determined to be an abnormally dangerous instrumentality by a state court?

I. The Federal Power Act Establishes the Exclusive Jurisdiction of the Federal Courts Over this Case

A. The Plain Language of the Act Establishes Exclusive Federal Jurisdiction

Sections § 803(c) and 825p of the Federal Power Act, quoted in pertinent part at p. 2, *supra*, state that the District Courts shall have exclusive jurisdiction. There is no legislative statement to the contrary and the language is explicit, conclusive, and consistent with the underlying Congressional scheme. *Escondido Mut. Water Co. v. LaJolla Bank of Mission Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753, 761 (1984).

⁷There are approximately 1600 federally owned or licensed hydro-electric power plants located in 47 states. (App. I).

*B. Exclusivity Of Jurisdiction Is Consistent With
The Congressional Scheme*

By the Federal Power Act, Congress created a comprehensive federal licensing and regulatory scheme for water power projects (such as the Lake Lynn Dam) utilizing or affecting the navigable waters of the United States, or other waters over which Congress has jurisdiction. *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 85 S.Ct. 1253, 14 L.Ed.2d 239 (1965). That comprehensive federal scheme of regulation is demonstrated by the Federal Power Act's preempting of the states' authority to regulate hydroelectric facilities governed by the Act and the vesting in FERC of exclusive jurisdiction to license and regulate those facilities. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 773, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753, 761 (1984); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 168, 66 S.Ct. 906, 913, 90 L.Ed. 1143, 1151 (1946). The Federal Power Act provides the substantive framework for the issuance of licenses for hydroelectric projects, and the control of those projects by FERC, including the maintenance and operation thereof.

The Federal Power Commission, by incorporation of the following language into licenses such as West Penn Power Company's, recognizes the primacy and exclusivity of federal jurisdiction over the navigable waters of the United States and the hydroelectric projects thereon:

Article 29. The right of the Licensee and of its Transferees and successors to use or occupy waters, *over which the United States has jurisdiction*, under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless Licensee has obtained a new

license pursuant to the then existing laws and regulations or an annual license under the terms and conditions of this license.

Article 30. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

(Emphasis supplied.) Form L-3 (revised September 1, 1968), Terms And Conditions Of License For Constructed Project Affecting Navigable Waters Of The United States (incorporated by reference into *Order Issuing License To West Penn Power Company Power Company, Project No. 2459, Issued October 21, 1970*). (App. G).⁸

There are at least three important considerations which underlie Congress' mandate of exclusive jurisdiction. First, hydroelectric projects are routinely constructed on major waterways—the navigable waters of this country. Congress has historically acted to develop and protect the navigable waters, as evidenced by its enactment of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-467n, and its predecessor statutes. Therefore, in addition to guaranteeing a uniform application of the Federal Power Act, the provisions relating to exclusivity of

⁸It is significant that the Pennsylvania legislature recognized this mandate by enacting the following statutory provision:

A power dam or change in stream to develop power shall be deemed to be *within the jurisdiction of the United States*, within the meaning of this section, whenever (1) such dam or change is constructed or made, or to be constructed or made, in or upon navigable waters of the United States, or (2) the Federal Power Commission shall have found that the interests of interstate or foreign commerce would be affected by the construction of such dam or the making of such change.

jurisdiction also guarantee that the regulation of major hydroelectric projects in this country will develop in a manner consistent with the federal statutes, case law and administrative rulings governing navigation and navigable waters.

Second, because the vast majority of federally owned or licensed hydroelectric projects are located on major waterways flowing through more than one state, damages associated with a single incident of flooding or in some other way related to the operation of hydroelectric projects could occur in several different states. Such an eventuality has occurred in this case; the alleged cause of the flooding which occurred in Pennsylvania is the operation of defendant's dam, which is located in West Virginia. (Complaint, ¶¶ 1, 6, 12, App. E).

In cases in which the operation of a hydroelectric project affects residents of more than one state, unless there is exclusive federal jurisdiction, the project operator could be subject to inconsistent rulings throughout the geographical area downstream from the project. So here, if property damage claims had been filed in West Virginia, in addition to the burden of having to try the case twice in two different jurisdictions, the defendant could be faced with one result in West Virginia and a different one in Pennsylvania.⁹ However, if state courts recognize Congress' mandate of exclusive federal jurisdiction, such an operator could utilize the multi-district litigation provisions of the federal law and ensure itself of consistency in the standards by

⁹For example, it is not at all inconceivable that the courts of one state could hold that the defendant's dam is a dangerous instrumentality, and the courts of the other rule that it is not, and the defendant as well as the federal government would be faced with conflicting obligations.

which it is judged and the liabilities for which it is responsible. See 28 U.S.C. §§ 1404 and 1407. See also Preliminary Study of Complex Litigation, Report, pages 48 to 54 (American Law Institute, March 31, 1987) which appear in the Appendix hereto (App. J).

Finally, this Court has recognized that a purpose of the Federal Power Act is the comprehensive development of water power. *Chemehuevi Tribe of Indians v. Federal Power Comm'n.*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975). The subjection of licensees under the Act to inconsistent adjudicatory results in different state forums is analogous to a grant of veto power to the states over federal approval for power projects under the Act.

Here, the Federal Power Commission issued a license to West Penn Power Company for the operation of the Lake Lynn project. That license, issued by Order and pursuant to (and including obligations to comply with) the rules, regulations and orders prescribed by the Act, contains a comprehensive recitation of West Penn Power Company's duties and liabilities in connection with the maintenance and operation of the Lake Lynn Dam.

The plaintiffs' Complaint, as amended, and the Motion for Class Action Certification raise the question of whether West Penn Power Company violated its federal license and otherwise violated FERC orders. In addition to the judicial procedural history of this case recited heretofore, it is significant that FERC investigated West Penn Power Company's operation of the Lake Lynn Dam during the Election Day Flood and found West Penn Power Company without fault. The testimony of FERC's Ronald A.

Corso¹⁰ on the two common issues of fact raised by plaintiffs in their Motion for Class Action Certification is as follows:

Pursuant to its authority under the Federal Power Act, the FERC licenses non-Federal hydroelectric projects. Therefore, the Commission has jurisdiction over the Lake Lynn project. The license for the Lake Lynn project was issued in 1970.

In view of the committee's inquiry and pursuant to the Commission's regulations, the staff of the Division of Inspections has conducted its own independent investigation. We have reviewed hydrologic data and the project operation by the licensee during the flood event of November 4 and 5, 1985. Our review found that operation of the project was consistent with the license. We have also independently confirmed that the licensee did issue advance flood warnings in accordance with the procedures outlined in the Emergency Action Plan required by the Commission's regulations.

In evaluating the operation of Lake Lynn Dam during this unusual flood event, it is important to note that the project was constructed for the primary purpose of generating hydroelectric power and that Lake Lynn has no storage capacity for flood control. Our review of the licensee's operation of the project powerhouse on November 4 and 5, 1985, to lower the reservoir

¹⁰In response to interrogatories regarding the basis for some of the allegations contained in the Complaint, plaintiffs identified the testimony of Ronald A. Corso, Director, Division of Inspections, Office of Hydropower Licensing, Federal Energy Regulatory Commission given on February 7, 1986, at the Hearing before the Subcommittee on Water Resources of the Committee on Public Works and Transportation, House of Representatives. Mr. Corso's complete testimony appears in the Appendix hereto. (App. H).

and the subsequent operation of the spillway gates on November 4 and 5, 1985, indicates that the project did not have any significant effect on the peak flood flows that occurred downstream on the Monongahela River and Cheat River.

The spillway gates were gradually opened to pass the extreme flood flows that entered the reservoir. The unprecedented magnitude of the flood also created a large amount of debris that was trapped by the dam. While the debris did cause clogging of the spillway gates, our analysis indicates that this had no significant effect on the peak flows downstream of the project.

We also reviewed the licensee's procedures in implementing the emergency action plan required by the Commission's regulations. We contacted the Corps of Engineers and officials of Fayette and Greene Counties. All parties indicated that the licensee provided adequate notification and maintained communication throughout the flood event.

The license for the Lake Lynn project includes article 33, in the license pursuant to a recommendation by the Corps of Engineers at the time of licensing. Article 33 requires that the project be operated so as not to cause a flood peak greater than would have occurred in the absence of the project. Our review indicates that the licensee complied with the license requirement.

In conclusion, our review indicates that the licensee complied with the license for the Lake Lynn project and the Commission's regulations.

Thus, the amended state court Complaint raises issues already considered and resolved by the Congressionally created regulatory commission.

Because the issues of the execution of duties imposed by FERC and the license are strictly and solely within the purview of the federal district courts (by virtue of the grant of exclusive jurisdiction in Section 825p), lawsuits raising such issues must be heard by a federal district court.

*C. The Federal Power Act Contemplates
Tort Actions Only in the Federal Courts*

Exclusivity of jurisdiction to review and evaluate the operation and maintenance of federally owned or licensed hydroelectric dams satisfies an important element in the Congressional regulatory scheme: that of having only one uniform judicial system of review.

To the extent that state claims arise in connection with a federally licensed hydroelectric project, the Federal Power Act provides for disposition through the federal district court system. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938). This is not a question of preemption of state law. However, to avoid the chaos which might result from a lack of exclusivity, the absence of the uniform system of review, and the impact that state judicial actions would have upon the controlling federal system, in many cases this Court has preempted state law. The petitioner is not contending for that result, but contends that exclusivity of jurisdiction and the problem of handling state causes of action are not inconsistent and are no different in this situation than in a diversity case or pendent jurisdiction case where state causes of action are presently litigated. Thus, although the petitioner does not claim preemption here, the following cases are cited merely to show the possible negative effect of state court involvement in the federal regulatory scheme.

It is well established that actions for compensatory damages have a strong regulatory effect and their regulatory consequences can interfere with the purposes of a federal statute. *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 815 n.19, 93 L.Ed.2d 883, 901 n.19 (1987); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26, 101 S.Ct. 1124, 67 L.Ed.2d 258, 270 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47, 79 S.Ct. 773, 3 L.Ed.2d 775, 783-784 (1959).

"[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, and indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 247, 3 L.Ed.2d at 784 (emphasis added).

This Court recently reaffirmed these principles in *International Paper*, in which it held that a common law nuisance action for compensatory damages from pollution was preempted by federal law. The Court held that permitting state law actions would create "a chaotic regulatory structure" and that if compensatory damages were permitted, the defendant "might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." 107 S.Ct. at 815 n.19, 93 L.Ed.2d at 901, n. 19.

This Court has also held other damage actions preempted because their conflict with federal statutory purposes of uniformity was constitutionally unacceptable. In *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, *supra*, the Court held that a state law action, including common law claims for damages for discontinuation of rail service, was preempted, concluding that:

"It would vitiate the overarching congressional intent . . . to permit the State . . . to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress."

450 U.S. at 325-26, 67 L.Ed.2d at 270. See also *International Brotherhood of Electrical Workers v. Hechler*, 107 S.Ct. 2161, 55 U.S.L.W. 4694 (1987) (state common law tort claim for personal injuries preempted because of conflict with federal need for uniformity in interpretation of labor contracts); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 105 S.Ct. 1904, 85 L.Ed.2d 206, 215 (state common law tort action for bad faith handling of an insurance claim under a labor agreement preempted and barred because permitting the state law action threatened "[t]he interests in interpretive uniformity and predictability that require that labor contract disputes . . . be subject to uniform federal interpretation.").

Because of damage awards, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247, 3

L.Ed.2d at 784. Damage awards become regulatory in effect.

Avoidance of a "chaotic regulatory structure" is the reason why United States District Courts have exclusive jurisdiction over the claims asserted by plaintiffs. It also explains Congressional intent in enacting Sections 803(c) and 825p.

Finally, if the causes of action presented by the plaintiffs are not within the exclusive jurisdiction of the federal courts pursuant to Sections 803(c) and 825p, then those jurisdictional sections of the Federal Power Act will be rendered a nullity.

II. The Issues Presented are Important to FERC, the United States Army Corps of Engineers and The Operators of Federally Licensed Hydroelectric Dams Throughout the United States

Two established federal agencies and the Congressional policies which they are charged with implementing would be significantly affected by plaintiffs' attempts to change the federal regulatory scheme through state court actions.

The first agency is FERC, which was created to implement, *inter alia*, the Federal Power Act, originally the Federal Water Power Act. Part I of the Federal Power Act was enacted to provide a means of comprehensive federal control over uses of the nation's water resources which the federal government has a legitimate interest in overseeing. These interests include navigation, flood control, irrigation, and, significantly, hydroelectric power. *Federal Power Comm'n. v. Union Electric Co.*, 381 U.S. 90, 98, 85 S. Ct. 1253, 14 L.Ed. 2d 239, 245 (1965).

Part I of the Federal Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so..." *First Iowa Hydro-Electric Corp. v. Federal Power Comm'n.*, 328 U.S. at 180, 90 L.Ed. at 1158.

The principal concern of the Federal Water Power Act was the development and regulation "of hydroelectric power to meet the needs of an expanding economy." *Union Electric*, 381 U.S. at 99, 14 L.Ed.2d at 246 (footnote omitted).

The second affected agency is the United States Army Corps of Engineers which, since the early years of our country, has been involved with inland transportation systems. Originally, the Army Corps of Engineers was charged with improving navigation by removing "snags" and constructing dams to provide a minimum three-foot navigation depth. Since that time, the Army Corps of Engineers has become the designer, builder and developer of our nation's navigable waterways and is currently acting under the Rivers and Harbors Appropriation Act of 1899, *supra*, as amended.

The two federal agencies and the Congressional policies which they are charged with administering are inseparable from the controversy which exists between the parties hereto. Plaintiffs' Complaint, as amended, challenges the core of the comprehensive federal regulatory scheme for hydroelectric dams and navigation by seeking to impose standards on West Penn Power Company other than those established by FERC in issuing the license for the Lake Lynn Dam. This challenge to agency regulation of

hydroelectric dams attacks the fabric of the federal regulatory scheme developed over the last century. Attempts to raise the issue that a hydroelectric dam is a dangerous instrumentality before state court fact finders, such as that of plaintiffs herein (Count II, App. F), could have drastic counterproductive effects. Congress did not intend that its policies be frustrated by a multitude of state courts. The Congressional policy should be carried out by federal courts unaffected by local considerations and attitudes.

This controversy is ripe for resolution. Determination of the state and federal relationships concerning the regulation of hydroelectric dams presents this Court with the necessity to resolve and uphold the Congressional requirement that the federal courts decide such issues.

Only by such review may this Court prevent possible state judicial interference with the regulation of federally licensed hydroelectric dams not only with respect to West Penn Power Company but with respect to similarly situated operators nationwide. Without this review, West Penn Power Company and other hydroelectric dam operators will be required to serve a multitude of masters, only one of which is acting to further the federal regulatory scheme.

III. The Pennsylvania Superior Court Did Not Have the Benefit of the Controlling Case of this Court and Misapprehended the Exclusive Jurisdiction Requirement of the Federal Power Act

This Court recently decided *Schneidewind v. ANR Pipeline Company*, ___ U.S. ___, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988), which is controlling. Although decided after the Superior Court's decision, *Schneidewind* makes it clear that the Pennsylvania Superior Court misinterpreted

and misapplied this Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961).

The Pennsylvania Superior Court concluded that Sections 803(c) and 825p of the Federal Power Act did not mandate exclusive federal jurisdiction. The Superior Court reached its conclusion based principally upon a comparison of the provisions of the Federal Power Act with provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z.

In its Opinion dated August 25, 1987, the Pennsylvania Superior Court stated that:

... our reliance upon *Pan American* is not unwarranted in light of Congressional debates indicating that:

- 1) The Natural Gas Act was intended to operate similar to the Federal Power Act;

- 2) The Natural Gas Act was patterned after the Federal Power Act in the regulatory area;

- 3) The Natural Gas Act merely contained standard provisions which had been incorporated into other regulatory legislation, including the Federal Power Act; and

- 4) Congress intended to establish a fairly common rate making and regulatory scheme for interstate sales of natural gas similar to the Federal Power Act. (Citations omitted.)

Engle v. West Penn Power Co., 366 Pa. Super. at 112, 530 A.2d at 917. (App. B). The Superior Court continued to justify its reliance on the *Pan American* case by pointing out that the jurisdictional provisions of both the Natural

Gas Act and the Federal Power Act were identical. Therefore, the court reasoned that, because the *Pan American* case held that the Natural Gas Act did not "preempt" state contract actions, the Federal Power Act must operate in the same way. In light of the holding of *Schneidewind*, such action by the Pennsylvania Superior Court was error.

Pan American involved a similar legal question: whether the federal district courts had exclusive subject matter jurisdiction. However, *Pan American* concerned a contract dispute between private parties, not a tort action for violation of federal orders and regulations such as plaintiffs have brought here. The *Pan American* petitioners contended that, because the Natural Gas Act (15 U.S.C. §§ 717-717z) conferred on the district courts of the United States exclusive jurisdiction "of violations of this [statute] or the rules, regulations and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder," that the Delaware courts had no jurisdiction in that case. 15 U.S.C. § 717(u). The *Pan American* petitioners contended that because the Natural Gas Act conferred such exclusive jurisdiction over violations thereunder, their cause of action was within the exclusive jurisdiction so conferred.

Schneidewind addressed the extent to which Congress regulates those matters to which the Natural Gas Act relates. This Court's decision in *Schneidewind* is applicable and demonstrates the Pennsylvania Superior Court's error. In *Schneidewind* this Court stated:

The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375,

383 (1983). See also *Fidelity Federal Savings & Loan Assn. v De la Cuesta*, 458 U.S. 141, 152-154 (1982).

A pre-emption question requires an examination of congressional intent. *Id.* at 152. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941.)" *California Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. —, — (1987) (slip op. 7), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

In this case we conclude that Act 144 regulates in a field the NGA has occupied to the exclusion of state law, and that it therefore is pre-empted.

Schneidewind, 99 L.Ed.2d at 325.

The Federal Power Act is no different. The federal government's regulation of hydroelectric dams so occupies the field as to preclude any state regulation including attempts at judicial regulation by state court decisions and instructions by local judges to juries. Operators of federally licensed hydroelectric dams should not be required to proceed through state court systems and ultimately to this Court when the problem can be resolved now by the grant of this Petition.

Additionally, the Pennsylvania Superior Court's decision is in error because the *Pan American* case was a contract action. This fact distinguishes it in all important respects from the case at bar. In fact, this Court stated in its opinion in *Pan American* that "*the fact that Cities Service sues in contract or quasi-contract . . . is decisive.*" *Pan American*, 366 U.S. at 664, 81 S.Ct. at 1308, 6 L.Ed.2d at 590 (emphasis supplied). This distinction is crucial, and has been recognized by at least one Circuit Court of Appeals in two recent cases in which that court has had occasion to refer to or rely upon the *Pan American* decision. *United Jersey Banks v. Parell*, 783 F.2d 360, 368 (3d Cir. 1986), cert. denied, 106 S.Ct. 2829, 90 L.Ed.2d 979, 54 USLW 3809 (1986) (distinguishing *Pan American* case from other "preemption" and "exclusive jurisdiction" actions because plaintiffs' Complaint sounded in contract) and *Exxon Corp. v. Hunt*, 683 F.2d 69, 74 (3d Cir. 1982), cert. denied, 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983) (distinguishing *Pan American* in that it is a contract action).

Neither the Natural Gas Act nor the Federal Power Act purport to include, within the scope of the grant of

exclusive federal jurisdiction, liability for breach of contract. Private contract actions merely affect the rights of the parties vis-a-vis their prior agreement.

However, tort cases, such as the one at bar, affect the basic Congressional policy. It is corroborative of this point that Congress' explicit inclusion of tort liability with the exclusivity of jurisdiction provision and failure to include liability for breach of contract establishes the important distinction which must be maintained between the situation presented in the *Pan American* case, and the situation presented in the case at bar.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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